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ABSTRACT

A brief historical review of the student disciplinary process in private colleges and universities, as well as a discussion of current practices and principles of student discipline, provide background for discussion of future possibilities. The analysis of current practices and principles includes a brief theoretical discussion about the legal basis for student discipline. Theories discussed include due process and contracts. Potential changes in the process in future years are examined and two areas of potential changes are identified. First, through review of case law, it appears that the concept of state action is being expanded with the result that more private colleges and universities could be affected by due process consideration. Second, there also appears to be an expansion in the public sector of a student's right to counsel during the disciplinary process. Implications from both of these possible changes are discussed. Private colleges and universities are advised that these changes may be forthcoming and that as a result, institutional student disciplinary practices and procedures could be affected. (MSE)

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THE STUDENT DISCIPLINARY PROCESS IN THE PRIVATE COLLEGE AND UNIVERSITY: IS THE MUSIC BEGINNING TO CHANGE?

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ABSTRACT

This paper has two foci. The first focus includes a brief historical review of the student disciplinary process in private colleges and universities as well as a discussion of current practices and principles of student discipline. The discussion of current practices and principles includes a brief theoretical discussion about the legal basis for student discipline. The theories discussed include due process and contract.

The second focus of the paper is to review potential changes in the student disciplinary process in future years. Two areas of potential change are identified. First, through review of case law, it appears that the concept of state action is being expanded with the result that more private colleges and universities could be affected by due process consideration. Second, there also appears to be an expansion in the public sector of a student's right to counsel during the disciplinary process.

Possible implications from both of these changes for the private college and university are discussed. These colleges and universities are advised that these changes may be forthcoming and that as a result, institutional student disciplinary practices and procedures could be affected.

Introduction

In recent years, judicial posture taken with regard to the disciplinary process in the private college and university has been fairly settled. As a result, student affairs administrators in such institutions have been traditionally comforted with the music of judicial non-involvement in student disciplinary matters.

The purpose of this brief paper is to review the current posture of judicial involvement with regard to the student disciplinary process in the private college and university.[1] Is this same music being played or has it begun to change?

With primary concern for the private college and university, this paper has two primary foci: 1) historical and current processes of student disciplinary procedures including several theories of student discipline, specifically, "due process" and "contract"; and 2) future developments in the student disciplinary process with regard to "state action" and the right to counsel.

I. History

Historically, the private college has enjoyed much latitude in the exercise of its rule enforcement procedures, particularly disciplinary rules. The case of Gott v. Berea[2] is illustrative:

> . . . (C)ollege authorities stand 'in loco parentis' concerning the physical and moral welfare and mental training of the pupils, and we are unable to see why to that end they may not make any rule or regulation for the government or betterment of their pupils that a parent could do for the same purpose. Whether the rules or regulations are wise, or their aims worthy is a matter left solely to the discretion of the authorities, or parents as the case may be, and in the exercise of that discretion the courts are not disposed to interfere, unless the rules and aims are unlawful or against public policy . . . .[3]

Similar language is also found in Anthony v. Syracuse.[4]

Thusly armed, both private and public colleges and universities proceeded to travel a student disciplinary road paved with broad institutional discretion. Formal proceedings were almost unheard of and suspensions and expulsions knew few limits. After one particular student was dismissed from a state university medical school for cheating (strongly denied by her) without any notice to the evidence used against her and without any notification as to who were her accusers,[5] Professor Seavy of the Harvard Law School penned this comment:

> It is shocking that the officials of a state educational institution, which can function properly only if our freedoms are preserved, should not understand the elementary principles of fair play. It is equally shocking to find a court supports them in denying to a student the protection given to a pickpocket.[6]

Changes, however, were not long in coming.

In 1961, in the landmark case of Dixon v. Alabama,[7] the court announced to all who would listen that in a state supported college or university, students were entitled to specific and particular procedural due process protections before they could be expelled for misconduct.[8] Other cases with similar holdings include Esteban v. Central Missouri Sate College,[9] and Soglin v. Kauffman.[10] In the Soglin case, for example, Judge Doyle emphasized that the historical "institutional disciplinary discretion" position, judicially approved in cases like Gott v. Berea,[11] had long ceased to operate:

> The facts of life have long since undermined the concepts, such as 'in loco parentis', which have been invoked historically for conferring upon university authorities virtually limitless disciplinary discretion.[12]

These judicial changes, however, were primarily directed toward the public, rather than private college and university.

II. The Disciplinary Process in the Private College

How does the student disciplinary process function in the private college and university and what relevant judicial guidelines, if any, apply?

Student discipline can generally be described as the process by which a person is accused of an alleged violation of college policy, placed into the machinery of the disciplinary process, with an adjudicative determination as to guilt or innocence finally made. Further, a discipline case generally attempts to balance at least two significant concerns: upholding the integrity of institutional rules and expectations with concern for the individual person.[13] This attempted balance usually assumes a both/and posture, not an either/or alternative.

The disciplinary process need not be considered a criminal proceeding.[14] Rather, it is generally viewed as an administrative proceeding:

> Universities do not maintain jails. They do not conduct trials, make criminal indictments or convictions, or fine or imprison offenders. They do formulate and administer their own disciplinary rules and inflict appropriate penalities for serious infractions thereof . . . . The 'due process' with which we are concerned is the procedure by which students are accused, heard, adjudged, and exonerated or punished for alleged infractions of discipline. These processes are carried on by the . . . college itself . . . and no one expects them to be the same as the elaborate procedures required in courts of law.[15]

The Due Process Theory of Student Discipline[16]

It may be technically correct to conclude that most of the legal decisions and therefore requirements promulgated by the courts in recent years[17] have little if any applicability to private colleges and universities. Most courts, for example, have heretofore been hesitant to become involved in the "substantive" expectations of an institution of higher learning. Rather, most of the directives have been made in order to guarnatee "procedural" safeguards, safeguards which are guaranteed by the "due process" clauses of the Fifth[18] and Fourteenth[19] Amendments to the United States Constitution.

It should be noted, however, that the federal Constitution and its protections, including "due process", only cover or protect public institutions and the officials therein:

> Because the Constitution was designed to limit only the exercise of government power, it does not prohibit private individuals or corporations from impinging on such freedoms as free speech, equal protection, and due process. Thus, insofar as the federal Constitution is concerned, a private university can engage in private acts of discrimination, prohibit student protests, or expel a student without affording the procedural safeguards that a public university is constitutionally required to provide.[20]

And as Brubacher has concluded:

> It may come as a surprise that most reviews of the acts of campus officers in the light of civil liberties and the Bill of Rights do not apply to private institutions of higher learning.[21]

When an aggrieved student party, therefore, at a private college or University, attempts to allege that his or her "due process" rights have

been violated, thereby triggering Fifth and Fourteenth Amendment protections, such party must first establish that "state or governmental action"[22] was involved in the complained of proceeding. Again, without a successful showing on the part of the aggrieved student party that the private college or university was involved in "state action", a "due process" argument may be less than successful. Accordingly, the litigation strategy involving a "due process" complaint generally includes an attempt to establish the existence of "state action" on the private institution's campus. How does one, however, attempt to show or establish "state action"?

It appears that several theories have been used to show the existence of "state action".[23] One theory has been referred to as the governmental aid or assistance theory.[24] Under this theory, the litigant would attempt to aggregate all governmental aid or assistance received by the private institution. The various types of aid or assistance which have been aggregated include: the granting of a state charter, state and federal student financial aid monies, capital construction grants and loans, and various tax exemption benefits.[25] Presumably then, the greater the aggregate of governmental benefits, the greater the indcia of "state action".

A second theory has been referred to as the public character or function theory.[26] According to this theory, the current realities of higher education are such so that "it has become increasingly public in nature."[27] In other words, "the function of private higher education is so essentially public that a governmental standard should judge its performance."[28]

A third theory of "state action" has been referred to as the delegated power theory.[29] In this scenario, the government actually delegates a

particular task to the private institution which then carries out such delegated task on behalf of the government.[30] In such a situation, a college official could act in a private capacity (when carrying out the non-delegated functions of office) as well as in a governmental capacity (when carrying out the delegated functions of office).

While other theories may and have been used to argue for the existence of "state action",[31] these theories have provided the basic vehicles in which to carry the "state action" argument. In most cases, competing theories and claims must be weighed and balanced against each other. Accordingly:

> Because of varying patterns of governmental assistance and involvement, a continuium exists ranging from the obvious public school (such as the tax-supported state university) to the obvious private school (such as the religious seminary). The large gray area between these extremes provides a continuing source of debate about how far the government must be involved before a "private" institution may be considered "public" under the Constitution.[32]

If an aggrieved student party, however, does successfully make the "state action" showing, what are some of the arguments which could be used to defeat a "due process"action? Two ways are suggested.

First, even if a showing of "state action" could be made, apart from a similar showing of property or liberty loss, the student litigant would probably be unsuccessful in maintaining the "due process" cause of action. Almost without exception, the cases which involve lengthy judicial discussions on "due process" and student discipline are cases wherein the institutional sanction involved was dismissal/suspension or expulsion.[33] In such an instance, it is not overly difficult to demonstrate a property or liberty loss. In other words, the greater the property or liberty loss, the easier will be the burden of developing a successful "due process" argument.[34]

Second, even if a litigant has sustained a loss of property or liberty, absent a showing of denial of "due process", the "due process" action will probably be defeated. As long as the substantive end desired by the private college or university is not violative of public policy, the presentation of and subsequent adherence to an announced "due process" procedure will most likely permit the college or university to have both the suspension and expulsion sanction or some lesser sanction.

Further, current judicial pronouncements on "due process", if applicable at all to private colleges and universities, do not have the effect of requiring specific (as compared to general) procedural requirements in expediting student discipline cases. As long as students are given notice, the opportunity to be heard, and the right of appeal, all three having to meet the test of reasonableness, "due process" appears to be preserved.[35] Furthermore, only if an adversarial situation is set up whereby the private institution uses an attorney or law-trained person to prosecute the case is there the requirement which would give the accused student the right to defense counsel.[36]

The Contract Theory of Student Discipline

Just because an aggrieved student does not successfully maintain a "due process" argument does not mean the student will not have his or her day in court. Courts are increasingly recognizing students' right of contract,[37] not only in obvious areas such as room and board contract and academic offerings,[38] but also in disciplinary procedures.[39]

Under the theory of contract, the student and the college or university, wheather or not private, are deemed to have established a contract of enrollment wherein both parties suffer detriments and receive benefits. Such contracts may be either express (as in a room and board contract) or implied (from the totality of information/documents distributed

by an institution to its students). In both cases, the parties are expected to uphold their end of the contract.

With regard to student discipline, the contract theory basically means that in the exercise of its disciplinary sanctions, an institution must follow the procedural rules it has promulgated:

> At the threshold level, whenever an institution has established procedures which apply to the imposition of sanctions, the law will usually require that they be followed.[40]

The basic judicial role, then, is to determine whether or not the terms of the contract have been fulfilled.[41] Again, it should be noted that under the contract theory of student discipline, the characterization of an educational institution as private or public appears to be legally irrelevant. Under the "due process" theory of student discipline, however, such a characterization, for purposes of determining "state action", is absolutely essential.

III. Potential Developments in the Student Disciplinary Process

Given the preceding discussion, are there new trends re student discipline in the private college or university which could be instructive for the future? In other words, is it the same old song or is the music of limited judicial involvement with the student disciplinary process changing? There appear to be two possible trends worthy of note. The first is an expansion of the "state action" concept. Another is the right of students to be represented by legal counsel in the disciplinary process.

Expansion of the State Action Concept

For many years, the private college or university has not had to overly concern itself with "state action" considerations. Cases have traditionally been decided in favor of the private institution that "state action" was lacking. There were, of course, notable exceptions.[43] But as long as there was no institutional presence of "state action", it

was difficult if not impossible for an aggrieved student litigant to maintain a successful "due process" cause of action.

A line of cases is developing, however, which in essence suggests that a finding or non-finding of "state action" may be contingent on the nature of the right violated:

> (T)he courts willingness to find state action or action under color of law on the part of a college or university (here, private) may depend on the nature (emphasis added) of the alleged violation of federally protected rights.[44]

A brief review of several cases which have made this distinction might be helpful.

Powe v. Miles[45] involved the suspension of several Alfred University students because they disrupted an ROTC ceremony.[46] Alfred University had several constituent units, two of which were the Liberal Arts College and the Ceramics College.[47] The Ceramics College was operated by the University, by contract, expressly for and on behalf of the State of New York. And a state statute had expressly declared that the actions of Alfred, with regard to the Ceramics College, were the acts of the state.[48] Since four of the students were in the Liberal Arts College and three were in the Ceramics College,[49] the court found "state action" with regard to the Ceramics students but not with regard to the Liberal Arts students.[51] Thus the Ceramics students were entitled to "due process" while the Liberal Arts students were not. For purposes of the analysis here, however, the court specifically noted it would have been more willing to find "state action" with regard to the Liberal Arts students if racial discrimination had been involved:

> No one would question for a moment that the establishment of discriminatory admission policies for CC by the Alfred University trustees - not simply against blacks but against Jews or redheads- would constitute state action . . . .
>
> (D)iscrimination may stand somewhat differently, because of the peculiar offensiveness of the state's taxing all citizens for objectives from the benefits of which a particular category is arbitrarily excluded or disadvantaged.[52]

In Wahba V. New York University[53] and Grennya v. George Washington University[54] the litigation involved the firing of persons from projects which were funded by governmental sources. While the courts refused to find "state action" in the firing of the personnel, both observed that racial discrimination was not involved.

In the case of Williams v. Howard University[55] a student who was refused readmission to a private medical school alleged that the basis for his exclusion was racial discrimination and an arbitrary denial of due process.[56] With regard to the "due process" allegation, the student litigant attempted to show "state action" by showing Howard University's receipt of federal funds along with its tax exempt status. The court held, however, that this was not sufficient to show that the "Government exercises some form of control over the actions of Howard."[57] With regard to the claim of racial discrimination, however, the court reached the opposite conclusion:

> We assume that the allegation of substantial federal funding would be enough to demonstrate governmental action as to appellant's claim of racial discrimination.[58]

For other reasons, however, the court rejected the claims of the student litigant.

As a result, whenever litigation in the private college or university involves, as part of the complaint, an allegation of racial discrimination, there is an increasing likelihood that courts will find "state action" present in the complained of proceeding, eg., a firing, refusal to hire, dismissal, etc. Similar tendencies may also exist where allegations of sexual discrimination are involved.

The case of Weise v. Syracuse University[59] involved two women, one of whom claimed sexual discrimination as a reason for "refusal to hire"[60] and

the other who claimed sexual discrimination as a reason for "termination" from employment.[61] The Weise court specifically discussed and distinguished between one type of harm (racial discrimination) from another (sexual discrimination):

> Class-based discrimination is perhaps the practice most fundamentally opposed to the stuff of which our national heritage is composed, and by far the most evil form of discrimination has been that based on race.
>
> (I)t is not necessary to put sex discrimination into the same hole as race discrimination to hold that in this case a less stringent state action standard should be employed than in the discipline cases.[62]

In essence, the Weise court developed a hierarchy of federal protections, each needing a different level of "proof" to sustain a finding of "state action." Listed in the order of "less proof" to "greater proof" the protections are as follows: racial discrimination, sexual discrimination, and disciplinary due process. In other words, it's more difficult to demonstrate "state action" for a "due process" claim than it is to demonstrate "state action" for a racial discrimination claim.

In summary, the "state action" determination is becoming increasingly complex. As it applies to the student disciplinary process in private institutions, if a dismissed student alleges that such is due to racial or sexual discrimination, the probabilities are increasing, that, provided other indicia of "state action" are present, such student dismissal will be measured by the traditional constitutional "due process" standards required of public colleges and universities, rather than measured solely by institutional "contract" procedures.

Student Right to an Attorney During the Disciplinary Process

For several years, the case law has remained fairly settled that students in both public and private colleges and universities do not have the right to hire an attorney to assist them in the defense of an institution's attempt re dismissal.[63] The general exception has been where the college or

University has used a lawyer or law-trained person to prosecute its disciplinary action.[64] Many colleges and universities on their own initiative, nevertheless, have granted students the right to have counsel present and active in the disciplinary process.

Several recent cases, although in public college and university settings, have granted to students the right to assistance by counsel during the disciplinary process. Such counsel was considered to be a right in the following cases: Giles v. Redfern,[65] North v. West Virginia Board of Regents,[66] and Gabrilowitz v. Newman.[67] All of these cases have factual situations which would appear to limit a broad expansion of the student right to counsel. In Giles,[68] for example, the right to counsel seems to have been a punitive sanction imposed on the college (Keene State College) because it failed to follow its own disciplinary rules. In North[69] the case involved a false transcript where the desired university sanction was cancellation of all of the student's academic credit. And in Gabrilowitz[70] the student involved was concurrently charged (by the state) with a crime. Finally, the January 15, 1979 Chronical of Higher Education reported another Rhode Island case where a student is challenging the disciplinary sanction imposed (removal of dormitory and cafeteria privileges) because "he was denied the right to have a lawyer present when he appeared before the university board."[71] So there does appear to be an increasing trend toward the mandatory provision of legal counsel in student disciplinary proceedings, at least in the public sector.

A second source of student right to counsel in student disciplinary procedures originates from an unlikely quarter, The Family Educational Rights and Privacy Act.[72] In Section 99.22 of the Final Regulation[73] there is the following language:

> (c) The parent of the student or the eligible student shall be afforded a full and fair opportunity to present evidence relevant to the issues raised under section 99.21, and may be assisted or represented by individuals of his or her choice at his or her own expense, including an attorney (emphasis added).[74]

The subject of the above section is a hearing to "challenge the content

of a student's educational records."[75] The right is accorded to all students covered by the Act. Whether an institution is public or private is an irrelevant consideration. If it is in the federal interest to permit legal counsel re student records, it is quite logical to argue that is is equally in the federal interest to permit, if not require, legal counsel at disciplinary proceedings. The Family Educational Rights and Privacy Act could, therefore, be viewed as a potential liberalizing element in the student disciplinary process with regard to the provision of legal counsel.[76]

IV. Conslusion

This paper has briefly attempted to tell two stories. The first has been a brief historical account as well as the nature of the student discipline process in the private college and university, including an analysis of traditional due process actions and how such are affected by state action. An attempt was also made to set out contract theory as another cause of action in this area. A second emphasis has suggested that the concept of state action continues to expand, as does the area of students' right to counsel, and that the developments in each, perhaps, portend future directions for the student disciplinary process in the private college and university.

In their book, The Academic Revolution,[77] Jencks and Riesman noted the following:

> The distinction between a public and private college was of no special importance during the first two centuries of American higher education. Then, after the Civil War, it became one of the central issues and divisions within the emerging academic system. Today . . . . the distinction seems once again to be loosing some of its importance.[78]

Just as Jencks and Riesman have suggested, it appears, at least for purposes of the student disciplinary process, that the distinction between public and private colleges and universities, "seems once again to be loosing some of its importance."[79]

From this review it appears that the music of judicial non-involvement has begun to change.

1. This paper will not attempt to exhaustively deal with this subject. Material recommended for further study includes the following: G. Holmes (Ed) Law and Discipline on Campus (Ann Arbor: Institute of Continuing Legal Education, 1971); Falan, "Dismissal Procedures in Private Schools: Due process Requirements", 6 Harv. Legal Com. 23 (1969); Faccenda, "Constitutional and Statutory Regulation of Private Colleges and Universities", 9 Val. U.L. Rev. 539 (1975); Keller and Meskill, "Student Rights and Due Process", 3 J.L. & Educ. 389 (1974); Toombs and Dibiase, "College Rules and Court Decisions: Notes on Student Dismissal", 2 J. Coll.& U.L. 355 (1975); Wilkinson and Rolapp, "The Private College and Student Discipline", 56 A.B.A. J.121 (1970); Comment, "Legal Relationship Between the Student and the Private College or University", 7 San Diego L. Rev. 244 (1970); Comment, "Student Due Process in the Private University: The State Action Doctrine", 20 Syracuse L. Rev.911 (1967); Forum, "Private Universities: the Right to be Different", 11 Tulsa L.J. 58 (1975); Note, "An Overview: The Private University and Due Process", 1970 Duke L.J. 795; Note, "Civil Rights - Private College Discipline and Due Process Afforded to Students", 23 S. Carolina L. Rev. 175 (1971); Note, "Judicial Intervention in Expulsions or Suspensions by Private Universities", 5 Willamette L.J. 277 (1967); Note, "Judicial Review of the University - Student Relationship: Expulsion and Governance", 26 Stan. L. Rev. 95 (1973); Note, "Private Government on Campus - Judicial Review of University Expulsions", 72 Yale L.J. 1362 (1963); and Symposium, "Legal Aspects of Student - Institutional Relationships", 45 Den. L.J. 497-678 (Special 1968). See generally, Law Student Div. of the Am. Bar Ass'n, Model Code for Student Rights, Responsibilities & Conduct (1969); and Special Publication, New York University School of Law, Student Conduct and Discipline Proceedings in a University Setting (1968). See also, 15 Am. Jur. 2d, "Colleges and Universities", Sections 16-28 (1964); and 14 C.J.S., "Colleges and Universities", Sections 8-29 (1939).

2. 156 Ky. 376, 161 S.W. 204 (1913). Accord. Burg v. Milwaukee Medical College, 128 Wis. 7, 106 NW 116 (1906); Barker v. The Trustees of Bryn Mawr College, 278 Pa. 122, A. 220 (1923); and Frank v. Marquette University, 209 Wis. 372, 245 NW 125 (1932). But see, Hill v. McCauley, 3 Pa. Co. 77 (1887); Clark v. Osborne, 24 Mo. App 309 (1887); Baltimore University v. Colton, 98 Md. 623, 57 A. 14 (1904); and McClintock v. Lake Forest University, 222 Ill. App. 468 (1921).

3. 156 Ky. at 206.

4. 224 App Div. 487, 231 N.Y.S. 435 (1928).

5. Bluett v. University of Illinois, 10 Ill. App. 2d 407, 134 N.E. 2d 635 (1956).

6. Seavy, "Dismissal of Students: 'Due Process'," 70 Harv. L. Rev. 1406. 1407 (1957).

7. 186 F. Supp. 945 (M.D. Ala. 1960), 294 F.2d 150 (5th Cir. 1961); cert. denied 368 U.S. 930 (1961).

8. The protections enumerated by the Dixon Court included the following: 1) the notice of charges should contain specific charges; 2) the hearing process should provide opposing parties the opportunity to hear the other's position "in considerable detail"; 3) the accused should be given the names of

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8. The protections enumerated by the Dixon Court included the following: 1) the notice of charges should contain specific charges; 2) the hearing process should provide opposing parties the opportunity to hear the other's position "in considerable detail"; 3) the accused should be given the names of

complaining witnesses as well as a summary statement of their testimony; and 4) the accused should have the right to produce witnesses and/or affidavits in support of his/her position (294 F. 2d at 158-159).

9. 277 F. Supp. 649 (W.D. Mo. 1967), 290 F. Supp. 622 (W.D. Mo. 1968), 415 F. 2d 1077 (8th Cir. 1969), cert. denied 398 U.S. 965 (1970).

10. 295 F. Supp. 978 (W.D. Wis. 1968), 418 F. 2d 163 (7th Cir. 1969).

11. See Note 2, supra.

12. 295 F. Supp. at 988.

13. P. Hollander, Legal Handbook for Educators, 119 (1978).

14. Some writers have urged the adoption of a private law disciplinary model rather than a criminal model. In this model, for example, a student would pay a $150 fine rather than be dismissed. See Carrington, "On Civilizing University Discipline", in G. Holmes (Ed.) Law and Discipline on Campus, 71-90 (1971).

15. M. Chambers, The Colleges and the Courts, 214 (1972)

16. There are a variety of legal causes of action by which a student could seek to hold an institution liable for its "wrongful" actions. See, for example, P. Hollander, op. cit. at 42-48. Only "contract" and "due process" causes of action will be explored in this paper.

17. See Van Alstyne, "The Student as University Resident", 45 Den. L.J. 592-595 (Special 1968), for a delineation of some of those requirements.

18. See T. Norton, The Constitution of the United States, 213-215 and Appendix B at 279 (1943).

19. Ibid. at 241-244 and Appendix B at 280, 281.

20. W. Kaplin, The Law of Higher Education, 20-21 (1978).

21. J. Brubacher, The Courts and Higher Education, 142 (1971).

22. "State Action" has been defined by the United States Supreme Court as: "Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character so as to become subject to constitutional limits placed upon state action." Evans v. Newton, 382 U.S. 296, 299 (1966). See also, Van Alstyne and Karst, "State Action", 14 Stan. L. Rev. 3, 28-36 (1961); Note, "State Action: Theories for Applying Constitutional Restrictions to Private Activity", 74 Colum. L. Rev. 656 (1974); Note, "Common Law Rights for Private University Students: Beyond the State Action Principle", 84 Yale L.J. 120 (1974); and Hendrickson, "'State Action' and Private Higher Education", 2 J.L. & Educ. 53 (1973).

23. See Pendrell v. Chatham College, 370 F. Supp. 494 (D.C. Pa. 1974) where five different theories were analyzed and discussed by the Court. See also, Berrios v. Inter American University, 409 F. Supp. 769 (D. Puerto Rico 1975), 535 F.2d 1330, 37 ALR Fed. 596 (1st Cir. 1976), appeal dismissed 96 S.Ct. 2665 (1976).

24. One of the more exhaustive treatments on the subject of state action and the private or independent college is: "Annotation - Action of Private Institutions of Higher Education as Constituting State Action, or Action Under Color of State Law, for Purposes of Fourteenth Amendment and 42 U.S.C.A. Section 1983", 37 ALR Fed 601-671 (1978). Such annotation analyzes the governmental aid or assistance theory.

25. Comment, "Sex Discrimination in College Admissions: the Quest for Equal Educational Opportunities", Ia. L.J. 209, 218, 219 (1970).

26. Kaplin, op. cit. at 23.

27. See Note 25, supra at 219. See also, O'Neil, "Private Universities and Public Law", 19 Buffalo L. Rev. 155, 168 (1970).

28. O'Neil, op. cit. at 169.

29. Kaplin, op. cit. at 22.

30. See, for example, Powe v. Miles, 294 F. Supp. 1269 (W.D. N.Y. 1968), 407 F.2d 73, 32 ALR 3d 846 (2d cir. 1968).

31. See Reitman v. Mulkey, 367 U.S. 369 (1967).

32. Kaplin, op. cit. at 21.

33. See, for example, Dixon v. Alabama State Board of Education, 186 F. Supp. 945 (M.D. Ala. 1960), 294 F.2d 150 (5th Cir. 1961) where expulsion was the sanction. In Esteban V. Central Missouri State College (see Note 9 supra), suspension was involved. And in Soglin v. Kauffman (see Note 10 supra) expulsion was the sanction applied.

34. See Weise v. Syracuse University, 522 F.2d 397 (2d Cir. 1975): "As the conduct complained of becomes more offensive, and as the nature of the dispute becomes more amenable to resolution by a court, the more appropriate it is to subject the issues to judicial scrutiny" (at 406).

35. See, for example, Morrissey v. Brewer, 408 U.S. 471 (1972); Goss v. Lopez, 419 U.S. 565 (1975); and Cafeteria Workers v. McElroy, 367 U.S. 886 (1961). See also, Hollander, op. cit. at 22, 23.

36. See, for example, Barker v. Hardway, 283 F. Supp. 228 (S.D. W. Va. 1968), aff'd without opinion, 399 F.2d 638 (4th Cir. 1968), cert. den. 394 U.S. 905 (1969). This case involved a state-supported college. Compare Barker with French v. Bashful, 303 F. Supp. 1333 (E.D. La. 1969) which held that students were denied "due process" when they were refused the right to retain counsel. Here, the state university involved had used a third-year law student to prosecute its case. See also, Wasson v. Trowbridge, 269 F. Supp. 900

(E.D. N.Y. 1967), 382 F.2d 807 (2d Cir. 1967), 285 F. Supp. 936 (E.D. N.Y.1968) wherein the Court refused to accept the argument of a dismissed Merchant Marine cadet that "due process" requires representation of counsel.

37. Kaplin, op. cit. at 27,28. See also, Note, "Contract Law and the Student-University Relationship", 48 Ind. L.J. 253 (1973).

38. Hollander, op.cit. at 41, 42.

39. Kaplin, op. cit. at 177-182.

40. Ibid. at 236

41. See Kwiatkowski v. Ithaca College, 368 N.Y.S.2d 973 (S. Ct. 1975). See also, Behrend v. State, 55 Ohio App.2d 135, 379 N.E. 2d 617 (1977). Kaplin, appropriately, has also noted several exceptions under the theory of contract: 1) waiver and 2) non-materiality. See Kaplin, op. cit. at 237.

42. See, for example, Pendrell, v. Chatham College, 370 F. Supp. 494 (D.C. Pa. 1974); Grennya v. George Washington University, 167 App. D.C. 379, 512 F.2d 556 (D.C.Cir. 1975), cert. den. 423 U.S. 995 (1975); Counts v. Voorhees College, 312 F. Supp. 598 (D. S.C. 1970), aff'd 439 F2d 723 (4th Cir. 1971); and Cohen v. Illinois Institute of Technology, 384 F. Supp. 202 (D. I11. 1974), aff'd 524 F.2d 818 (7th Cir. 1975), cert. den. 425 U.S. 943 (1976).

43. See, for example, Rackin v. University of Pennsylvania, 386 F. Supp. 992 (E.D. Pa. 1974); Powe v. Miles, (see Note 30, supra); and Braden v. University of Pittsburgh, 343 F. Supp. 836 (W.D. Pa. 1972), 477 F.2d 1 (3d Cir. 1973), 392 F. Supp. 118 (W.D. Pa. 1975), 552 F.2d 948 (3d Cir. 1977).

44. See Annotation at Note 24, supra at 609.

45. See Note 30, supra.

46. Id. at 77,78.

47. Id. at 75.

48. Id.

49. Id. at 79.

50. Id. at 82.

51 Id. at 79,80.

52. Id. at 82.

53. 492 F.2d 96 (2d Cir. 1974).

54. See Note 42, supra.

55. ___App. D.C.___, 528 F.2d 658 (D.C. Cir. 1976), cert. den 429 U.S. 850 (1976).

56. 528 F.2d at 660.

57. Id.

58. Id. at 661.

59. 522 F.2d 397 (2d Cir. 1975).

60. Id. at 401.

61. Id. at 402.

62. Id. at 406.

63. No attempt is made herein to suggest what role such an attorney, if permitted by the institution, should have in the disciplinary process. See generally, Frey, "Rights of Counsel in Student Disciplinary Hearings", 5 Val. U. L. Rev. 48 (1970) and Note, "Student Has Right to Have Attorney Present at University Disoiplinary Hearing When CriminalCharges are Pending," 1978 B.Y.U. L. Rev.722 (1978).

64. See, for example, the cases cited in Note 36, supra. But see Esteban v. Central Missouri State College, (see Note 9, supra for cite). In Esteban, the right to counsel was specifically accorded to the disciplined students (277 F. Supp. at 651).

65. Reported in 7 The Coll. L. Digest 71 (1977).

66. 233 S.E. 2d 411 (W.Va. Sup.Ct.App. 1977).

67. 582 F.2d 100 (1st Cir. 1978).

68. See Note 65, supra.

69. 233 S.E.2d at 414.

70. See Note 67, supra.

71. 17 The Chron. Higher Educ.2 (Jan. 15, 1979).

72. 20 U.S.C. 1232g.

73. 41 Fed. Reg. 24670 (1976).

74. 20 U.S.C. 1232g (a)(2).

75. Id.

76. Some have argued that the Buckley Amendment/Family Educational Rights and Privacy Act itself is an exercise in governmental overreach. See, for example, Fitt, "The Buckley Amendment: Understanding It, Living With It", The Coll. Bd. Rev., Summer, 1975, No. 96 at 4: "I would like to put the issue in much stronger terms. I think the Buckley Amendment is an awesome precedent. It is the furtherest extension thus far of the tendency of the federal government to say that if you receive public funds for one purpose, your conduct for any other purpose is subject to regulation."

77. C. Jencks and D. Riesman, The Academic Revolution (1977).

78. Ibid. at 257.

79. See Slaughter v. Brigham Young University, 514 F.2d 622 (9th Cir. 1975). In this case, a student was dismissed for a violation of the University's Honor Code. In holding that the dismissal and the proceedings surrounding such met the requirements of constitutional due process, the Court noted: "It is not necessary under these circumstances to draw any distinction, if there be any, (emphasis added) between the requirements in this regard for private and for public institutions (at 625)."